Supreme Court, U.S
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No. 04-575

In The
Supreme Court of the United States

DIANNE R. NIELSON, in her official capacity as Executive Director of the Utah Department of Environmental Quality, *et al.*,

Petitioners,

v.

PRIVATE FUEL STORAGE, L.L.C., and SKULL VALLEY BAND OF GOSHUTE INDIANS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Tenth Circuit properly found that the Respondents' challenge to Utah's statutory scheme was ripe for review and preempted as violating the Supremacy Clause of the United States Constitution.

CORPORATE DISCLOSURE STATEMENT

Please see the Corporate Disclosure Statement of the Brief of Appellees in the action below. (Appellees' Br. at 1).

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STATEMENT OF THE CASE

Private Fuel Storage, L.L.C. ("PFS") was created to solve the problem of temporary storage of spent nuclear fuel ("SNF"). The Skull Valley Band of Goshute Indians (the "Band") is a federally recognized tribe, with a reservation within the State of Utah set aside pursuant to an 1863 treaty with the United States. PFS entered into a lease agreement with the Band pursuant to 25 U.S.C. § 415 to allow PFS to license, construct and operate a facility for the temporary storage of SNF on tribal lands (the "project") while the Federal Government licenses and builds a national, permanent repository for SNF and high-level radioactive waste. The executive and legislative branches of the State of Utah (the "State") oppose the project. That opposition has been vociferous and constant from the date the project was first announced.

Petitioners have consistently opposed the licensing of the project before the Nuclear Regulatory Commission ("NRC"), before other federal agencies, in public pronouncements, and in a legislative effort which culminated in the passage of an unconstitutional statutory scheme containing an explicit ban against the temporary storage of SNF in Utah. That scheme explicitly opposes the project, notwithstanding the federal license-requirement status, tribal sovereignty, and a tribal lease that is subject to the exclusive regulatory authority of the Secretary of the Interior. The statutory scheme alternatively establishes Utah as a second nuclear regulatory authority with safety requirements over and above those of the NRC that essentially serve as a ban.

Respondents take issue with the way Petitioners are now recasting the statutory scheme, straining for a constitutional

statement or phrase somewhere within the scheme. Petitioners' current retreat from the clear language of these statutes (Pet. 6) should not mislead this Court.

The statutory scheme has two main attacks on PFS and the Band. First, it purports to ban the temporary storage of SNF, in derogation of the federal licensing process, tribal sovereignty, and a tribal lease, which is subject to the exclusive regulatory authority of the Secretary of the Interior. Second, it purports to establish an alternative regulatory process. Both approaches are preempted by federal law.

The statutory scheme articulates an outright ban to the placement of high-level nuclear waste in Utah by providing: "The state of Utah enacts this part to prevent the placement of any high-level nuclear waste . . . in Utah." App. 101a. Then, recognizing that the outright ban may not withstand scrutiny the scheme continues: "The state also recognizes that high-level nuclear waste . . . may be placed within the exterior boundaries of the state, pursuant to a license from the federal government, or by the federal government itself, in violation of this state law." *Id.*

In recognition of this eventuality, the scheme establishes Utah as a secondary nuclear regulatory authority by providing the following:

> Due to this possibility, the state also enacts provisions in this part to regulate transportation, transfer, storage, decay in storage, treatment, and disposal of any high-level nuclear waste . . . in Utah, thereby asserting and protecting the state's interests . . . should the federal government decide

> to authorize any entity to operate, or operate itself, in violation of this state law.

Id. at 101a-02a. Furthermore, the statutory scheme on its face underscores the State's intent to regulate the federally preempted field of nuclear safety concerns. This is clearly demonstrated by the scheme's section that provides:

> Any contract or agreement to provide any goods, services, or municipal-type services to any organization engaging in, or attempting to engage in the placement of high-level nuclear waste . . . at a storage facility or transfer facility within the state are declared to be against the greater public interest, health, and welfare of the state, by promoting an activity which has the great potential to cause extreme public harm.

Id. at 98a-99a.

The goals of health and safety from nuclear hazards are woven throughout the statutory scheme, but Petitioners attempt to distance themselves from this reality because they know they have invaded the federal regulatory arena which fully occupies the field of nuclear safety.

Moreover, even though Respondents have suffered injury from the statutes, Petitioners continue to argue that Respondents' claims are not ripe. However, Petitioners fail to give the Court any reason that justifies review.

Accordingly, on August 4, 2004, the United States Court of Appeals for the Tenth Circuit properly affirmed the District Court's ruling that the statutes are preempted by federal law.

SUMMARY OF ARGUMENT

Petitioners do not provide a compelling reason for granting a writ of certiorari. Petitioners make no persuasive showing that any of the reasons considered by this Court are present in this case. Specifically, the Petitioners provide no convincing argument that (a) the Tenth Circuit decision is in conflict with other circuits; (b) the Tenth Circuit decision has so far departed from the accepted and usual course of judicial proceedings that review by this Court is necessary; (c) the Tenth Circuit has decided an important question of federal law that has not been settled by this Court; or (d) the Tenth Circuit decision conflicts with decisions of this Court. Sup. Ct. R. 10.

In fact, even though Petitioners argue that this case is not ripe for review, Petitioners do not articulate any reason for granting the petition on this issue. Instead Petitioners attempt to mislead the Court with an argument based purely on the merits.

As with their ripeness argument, Petitioners' preemption argument is based primarily on the merits. It is only at the end of their brief that Petitioners provide any reason for review by this Court, making a half-hearted attempt to argue that the Tenth Circuit's preemption decision is in conflict with other circuits.

Respondents maintain that review by this Court is not necessary because the decision of the Tenth Circuit is consistent with the rulings of this Court as well as those of the other circuits, and no other reason for this Court's review is present. The Tenth Circuit analyzed *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190 (1983) and *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967) and, consistent

with those decisions, correctly held that the instant case was ripe for review.

The Tenth Circuit correctly applied the Court's two-prong test for ripeness: (1) the fitness of the issue for adjudication; and (2) the hardship to the parties of withholding judgment. Consistent with this Court's ruling in *Pacific Gas*, the Tenth Circuit found that the issue of preemption was predominantly legal, making it unnecessary to wait for the pertinent state agencies to define or analyze the subject self-executing statutes before adjudication. Also, the Tenth Circuit correctly found that the hardship prong of the test was satisfied because the Respondents' continued expenditure of time, energy, and money to obtain an NRC license would work a direct and substantial hardship on them as their efforts would be futile if the Utah statutes are found to be valid. Accordingly, the Tenth Circuit properly found that the issue was ripe for review.

Petitioners' entire brief is primarily devoted to an argument on the merits. Only at the very end do they set forth any reason for review, claiming a conflict between the circuits. However, no conflict exists between the preemption decision of the Tenth Circuit and the decisions of other circuits. The cases cited by Petitioners (*Kerr-McGee Chemical Corp. v. City of West Chicago*, 914 F.2d 820 (7th Cir. 1990) and *Citizens for an Orderly Energy Policy, Inc. v. County of Suffolk*, 813 F.2d 570 (2d Cir. 1987)) are clearly distinguishable from this case. Not only is the Tenth Circuit decision not in conflict with these cases, but its decision is clearly consistent with these holdings.

The decision of the Tenth Circuit was also correct and consistent with this Court's prior preemption decisions. Contrary to Petitioners' assertion, Respondents did not present a purely facial challenge to the Utah statutory scheme. Therefore, the Tenth Circuit's evaluation was consistent with this Court's decisions. The Tenth Circuit thoroughly examined the federal regulation of nuclear power and the Supreme Court decisions that addressed the preemptive effect of this extensive federal regulatory scheme. Those decisions were *Pacific Gas, Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), and *English v. General Electric Co.*, 496 U.S. 72 (1990). The Tenth Circuit examined very carefully each of the laws the Petitioners sought to defend and ruled consistently with these decisions that each is preempted by federal law.

Based on the foregoing, Respondents respectfully request that this Court deny the petition for writ of certiorari.

ARGUMENT

I. THE TENTH CIRCUIT'S DECISION THAT THE CASE WAS RIPE FOR REVIEW DOES NOT CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS OR OF THIS COURT, NOR IS THERE ANY OTHER BASIS FOR REVIEW.

Petitioners failed to provide any reason the Tenth Circuit's decision on ripeness justifies granting a writ of certiorari.[1] Instead, Petitioners base their argument solely

[1] The Tenth Circuit upheld the District Court's finding that Respondents had standing to challenge the subject Utah statutes and

(Continued on following page)

on the merits. The applicable standard for determining ripeness stated by the Tenth Circuit is consistent with this Court's rulings, as well as the rulings of every other circuit, and the Tenth Circuit's decision gives rise to no other justification for review.

A. The Tenth Circuit Applied the Appropriate Standard for Determining Ripeness in Accord with the Decisions of this Court and Other Circuits.

The Tenth Circuit properly applied the well-established ripeness standard articulated by this Court to find that this case was ripe for review. Specifically, the Tenth Circuit ruled that: (1) the issue of preemption in this case was predominantly a legal question fit for adjudication; and (2) the hardship to Respondents that would result from delaying a ruling on the merits made the case ripe for review. App. 21a-24a.

As expressed by this Court, the doctrine of ripeness "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 200 (1983) (quoting *Abbott Laboratories v. Gardner*, 387 U.S.

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regulations. App. 21a-24a. Petitioners do not dispute the Tenth Circuit's ruling or otherwise address the issue of standing in their Petition. Consequently, Petitioners have waived any right to challenge Respondents' standing to bring this case, and such is not properly before the Court. *See Izumi v. U.S. Philips Corp.*, 510 U.S. 27 (1993); *Clark v. City of Draper*, 168 F.3d 1185, 1186, n.1 (10th Cir. 1999); *see also* Sup. Ct. Rule 14. Accordingly, Respondents' arguments in this section shall solely address the issue of ripeness as challenged by Petitioners.

136, 148-49 (1967), *overruled on other grounds*, 430 U.S. 99 (1977)). Resolving a question of ripeness requires the application of the well-established two-prong test which considers: (1) the fitness of the issue for adjudication; and (2) the hardship to the parties of withholding judgment. *Id.* at 201 (citing *Abbott*, 387 U.S. at 149); *see also United States v. Wilson*, 244 F.3d 1208, 1213 (10th Cir. 2001).

Every circuit in the United States adheres to these ripeness principles and applies the two-prong analysis espoused in *Abbott* to resolve issues of ripeness. *See Rhode Island Ass'n of Realtors, Inc. v. Whitehouse*, 199 F.3d 26, 33 (1st Cir. 1999); *United States v. Quinones*, 313 F.3d 49, 58 (2d Cir. 2002); *Peachlum v. City of York, Pa.*, 333 F.3d 429, 434 (3d Cir. 2003); *Arch Mineral Corp. v. Babbitt*, 104 F.3d 660, 665 (4th Cir. 1997); *Groome Res. Ltd., L.L.C. v. Parish of Jefferson*, 234 F.3d 192, 199 (5th Cir. 2000); *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1170-71 (6th Cir. 1983); *Triple G Landfills, Inc. v. Bd. of Comm'rs of Fountain County, Ind.*, 977 F.2d 287, 289 (7th Cir. 1992); *Nebraska Pub. Power Dist. v. Mid-American Energy Co.*, 234 F.3d 1032, 1037-38 (8th Cir. 2000); *State of Cal. ex rel. State Water Res. Control Bd. v. F.E.R.C.*, 966 F.2d 1541, 1562 (9th Cir. 1992); *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1499 (10th Cir. 1995); *Alabama Power Co. v. United States Dep't of Energy*, 307 F.3d 1300, 1310 (11th Cir. 2002); *Nat'l Recycling Coalition, Inc. v. Browner*, 984 F.2d 1243, 1249 (D.C. Cir. 1993).

This was the standard applied by the Tenth Circuit as well. Thus, no conflict exists between the decision of the Tenth Circuit, the decisions of this Court, and the decisions of other circuits.

The Petitioners make no effort to challenge the applicability of *Abbott*. Instead, Petitioners erroneously argue that because there are possible future contingencies, the preemption issue is not fit for adjudication and Respondents have not and would not suffer any hardship if a decision on the merits of preemption were forestalled. The Petitioners are simply wrong, and their conclusions are unsupported in fact or law.

B. The Tenth Circuit Applied the *Abbott* Test for Ripeness Consistent with this Court's Decisions to Determine that the Preemption Issues in this Case Were Ripe for Review.

Through the application of the *Abbott* test, the Tenth Circuit found, consistent with this Court's application, that the case was ripe because: (1) the issue of preemption in this case was purely a legal question fit for adjudication; and (2) the Respondents would suffer a substantial hardship if a ruling on the merits was delayed. App. 21a-24a.

Consistent with this Court's ruling in *Pacific Gas*, the Tenth Circuit found that in this case the issue of preemption was purely legal, making it unnecessary to wait for the pertinent state agencies to define or analyze the subject self-executing statutes before adjudication. App. 23a-24a (citing *Pacific Gas*, 461 U.S. at 201); *see also Freehold Cogeneration Assocs. v. Bd. of Regulatory Comm'rs of N.J.*, 44 F.3d 1178 (3d Cir. 1995) (preemption is a legal issue not requiring further development by responsible agency).

In addressing the first prong of the *Abbott* test Petitioners contest the Tenth Circuit's ruling and take the position that any contingency as to whether a given law will be applied makes such law unfit for adjudicative review. Pet. 16 (citing *Texas v. United States*, 523 U.S. 296, 300 (1998)). Petitioners' reliance on *Texas* is misplaced. The contingency in *Texas* related to the ultimate interpretation and application of the subject statute, which itself was not self-executing and required substantial factual development to understand. *Texas*, 523 U.S. at 300-01. In *Texas* it was not even certain to whom the laws were intended to apply. *Id.*

In contrast, the Utah statutes require no factual development to see that the many self-executing provisions impose immediate injury. As a result the Tenth Circuit appropriately found that the issue of whether PFS could legally proceed to obtain a federally issued license from the NRC for the storage of SNF, without adhering to the exceedingly onerous and prohibitory Utah statutes, was a legal issue fit for adjudication. App. 23a-24a.

Consistent with this Court's decisions, the Tenth Circuit also correctly found that the hardship prong of the *Abbott* test was satisfied. The Tenth Circuit determined that withholding judgment on the issue of preemption would work a hardship on Respondents because their continued expenditure of time, energy, and money to obtain an NRC license would be futile if the Utah statutes are found to be valid. App. 24a (citing *Pacific Gas*, 461 U.S. at 201). Respondents' actions would be futile because the substantial expense and burden of complying with the Utah legislation would likely strip PFS of its ability to continue with its project. *Id.*

As the Tenth Circuit noted, the Utah statutes are self-executing and undisputedly require, among other things, a $5 million application fee, a 75 percent transaction fee, a cash bond of at least $2 billion, and a fee equal to 75 percent of the unfunded liability. Furthermore, they prohibit Utah counties from providing any services to the proposed PFS facilities. App. 22a. Therefore, the potential effect on PFS if the Utah statutes are not found to be preempted is certain. Consequently, the outcome of the *Abbott* test in *Texas* provides no guidance in this case.

Accordingly, the Tenth Circuit properly found that the issue of preemption is a purely legal question fit for adjudication and the hardship to Respondents certain. App. 21a-24a. For that reason the issue of preemption was ripe, and the Tenth Circuit was correct in ruling that Respondents are entitled to know whether the Utah legislative scheme was constitutional and enforceable.

II. THE TENTH CIRCUIT'S DECISION REGARDING PREEMPTION IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND THE OTHER CIRCUITS AND NO OTHER REASON FOR REVIEW HAS BEEN RAISED.

Petitioners do not provide any persuasive reason justifying this Court's grant of a writ of certiorari in this case. Petitioners' brief is primarily an argument on the merits. As an eleventh-hour effort, at the end of their brief Petitioners make a claim that the Tenth Circuit's preemption decision conflicts with decisions of other circuits. This is the only reason for review provided by Petitioners. However, Petitioners' argument is misplaced as the cases cited are distinguishable. Therefore, Petitioners' argument must fail.

A. No Conflict Exists between the Preemption Decision of the Tenth Circuit Court of Appeals and the Decisions of Other Circuits or this Court.

In its decision, the Tenth Circuit provided a thorough examination of the federal regulation of nuclear power and the Supreme Court decisions that address the preemptive effect of this extensive regulatory scheme. The Tenth Circuit's decision then meticulously examines each law Petitioners sought to defend and applies the rulings of this Court in making its decision that the laws are preempted. The Tenth Circuit's application was not only consistent with this Court's decisions, but also with the decisions of other circuits.

Petitioners claim that the Tenth Circuit's preemption decision in the instant case conflicts with *Kerr-McGee Chemical Corp. v. City of West Chicago*, 914 F.2d 820 (7th Cir. 1990), and *Citizens for an Orderly Energy Policy, Inc. v. County of Suffolk*, 813 F.2d 570 (2d Cir. 1987). Petitioners' reliance is in error as these decisions are clearly distinguishable.

Kerr-McGee involved a challenge to a municipality's erosion and sedimentation regulations that were on their face "completely 'radiation neutral.'" *Kerr-McGee*, 914 F.2d at 821, 824 (ruling that municipal ordinance that on its face targets only health and safety hazards unrelated to hazards created by radiation is not preempted). Contrary to the Petitioners' assertions, the city's regulations were not upheld because there was a way in which the city's regulations could be applied to address matters other than radiological safety hazards, but rather because the regulations had nothing to do with radiological safety hazards.

They were "completely 'radiation neutral'" and applied to all construction projects within the city. They were not created and adopted specifically to impede a nuclear-related facility as Utah's statutes were.

Furthermore, in *Kerr-McGee*, the NRC had specifically included compliance with the city's erosion and dust ordinances in Kerr-McGee's license. *Id.* at 822-23. Accordingly, the Seventh Circuit ruled that the city's code was not preempted, but limited to the extent that it did not involve aspects of the project that "directly involve radiation hazards (including those 'inextricably intermixed' with non-radiation hazards) and [were] not selected for scrutiny by the City merely to delay or frustrate the project as a whole." *Id.* at 827.

None of the statutes at issue in this case concerns neutral, previously-existing land-use, environmental, tort, or other traditional state laws not based on radiological safety. On the contrary, the Utah statutes were created and adopted specifically to address radiation hazards. App. 93a-95a, 105a-106a, 108a, 110a-113a, 119a-121a. Also, as pointed out by the Tenth Circuit, Petitioners failed to point out any evidence supporting a non-safety rationale. App. 38a. Thus, *Kerr-McGee* is inapplicable.

Suffolk involved a set of county-adopted resolutions pursuant to which the county refused to participate in the off-site radiological emergency evacuation planning for a nuclear power plant. *Citizens for an Orderly Energy Policy, Inc. v. County of Suffolk*, 604 F. Supp. 1084, 1088 (E.D.N.Y. 1985). Plaintiffs sued, asking the court to find that the county's resolutions were preempted by the Atomic Energy Act. *Id.*

The district court noted the uniqueness of the case because it involved the county's refusal to participate in emergency planning for a nuclear plant rather than an affirmative action that was challenged. *Id.* at 1094. In its decision, the district court noted that a local government could not establish itself as a second nuclear regulatory authority with safety requirements over and above those of the NRC. *Id.* In its analysis, the court examined the legislative history and found that because Congress was concerned that a municipality would frustrate the process by refusing to cooperate in emergency planning for nuclear facilities, it reached a compromise and "[r]ather than require participation [in emergency planning], Congress provided that the utility could provide a plan." *Id.* at 1095-96. The Second Circuit affirmed the decision for the same reasons set forth in the district court's opinion and ruled that the county had not affirmatively prevented the utility from pursuing its license or obstructed that pursuit. *Suffolk*, 813 F.2d 570, 571 (2d Cir. 1987).

Contrary to the premise of *Suffolk*, Petitioners have taken direct affirmative action deliberately intended to interfere with Respondents' Project. App. 94a, 101a, 126a-127a; Appellees' Br. at 10, 13-16, 19-21. Petitioners did not and cannot point to any legislative history demonstrating their action was specifically contemplated and allowed for in the Atomic Energy Act. App. 39a, 40a. *Suffolk* is clearly distinguishable and no conflict exists among the circuits.

B. The Decision of the Tenth Circuit Court of Appeals Was Correct and Consistent with this Court's Preemption Decisions.

The Tenth Circuit began its assessment of the preemption issue with an examination of the general principles of

preemption articulated by this Court. The Tenth Circuit then turned its examination to the federal regulation of nuclear power and this Court's decisions relating to preemption in this arena. Finally, the Tenth Circuit applied the rulings of those decisions to the instant case. Therefore, Petitioners' claim that the Tenth Circuit used the wrong standard of review must fail.

Petitioners have incorrectly characterized this case as a purely facial challenge, rendering their reliance on *California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572 (1987), misplaced. In *Granite Rock*, the Court considered whether its jurisdiction fell within its authority under 28 U.S.C. § 1254(2) "to review the decision of a federal court of appeals by appeal if a state statute is held by a court of appeals to be invalid as repugnant to the Constitution, treaties or law of the United States." *Id.* at 578-79 (internal quotations omitted). The Court of Appeals had found that the California Coastal Commission's exercise of permitting requirements was preempted by federal law but did not invalidate any of the California law. *Id.* at 579. Therefore, the United States Supreme Court found that *Granite Rock* was a case in which "an exercise of authority under state law is invalidated without reference to the state statute." *Id.* (internal quotations omitted).

The Court specifically noted that because of the posture of the case, Granite Rock did not argue that any conditions in particular conflicted with federal statutes or regulations, and the record did not disclose any particular conditions that might be placed on Granite Rock. *Id.* at 579-80. Instead, Granite Rock argued that there was no possible set of conditions that the California Coastal Commission could have placed on its permit that would

not conflict with federal law. *Id.* at 580. Thus, the Court characterized *Granite Rock* as a "purely facial challenge" to the California permit requirement. *Id.* This is in marked contrast to the issue before the Court in this Petition.

Contrary to Petitioners' assertions, Respondents did not launch a purely facial challenge to the Utah statutory scheme. We need not speculate as to the nature of the requirements of the statutes at issue nor wait to discover what conditions might be placed on Respondents. Those requirements and conditions are clearly embodied in the statutes in no uncertain terms, as is the statutory intent to protect the health and welfare of Utah citizens. Furthermore, those conditions are already affecting Respondents.

The factual record set forth by Respondents below demonstrates with particularity how the requirements and conditions of those statutes currently affect Respondents and how they are clearly grounded in nuclear safety concerns. Appellees' Br. at 25-29. Accordingly, the *Granite Rock* standard for preemption is inapplicable in this case, and the Tenth Circuit Court of Appeals correctly applied this Court's preemption decisions of *Pacific Gas*, *Silkwood*, and *English*.

In its decision, the Tenth Circuit analyzed each of the statutory provisions the Utah officials claimed were not preempted. App. 25a, 35a-52a. After a thorough examination of the federal regulation of nuclear power (App. 27a-30a) and the Supreme Court's decisions that addressed the preemptive effect of this extensive federal regulatory scheme, *Pacific Gas*, *Silkwood*, and *English* (App. 30a-35a), the Tenth Circuit applied the rulings of those cases

to the specific statutes the Utah officials sought to defend in their appeal. App. 35a-52a.

As recognized by the Tenth Circuit, the laws created and passed by the State of Utah are all distinguishable from the laws examined by the Court in *Pacific Gas*, *Silkwood*, and *English*. App. 38a, 39a, 42a, 45a, 47a. *Pacific Gas* dealt with decisions made by a state concerning the "[n]eed for new power facilities, their economic feasibility, and rates and services," all of which have been characteristically governed by states. *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983). In ruling against preemption, the Court found that California had not sought to impose its own standards on nuclear waste disposal, but had accepted federal responsibility to develop and license this technology. *Id.* at 219. This is in marked contrast with the laws imposed by Petitioners.

As the Tenth Circuit pointed out, in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), and *English v. General Electric Co.*, 496 U.S. 72 (1990), the laws examined were traditional state laws concerning tort liability and damages that had existed long before the federal government began regulating nuclear power and that applied no matter what the cause of the harm. App. 39a. Unlike this case, the laws under consideration in *Silkwood* and *English* were not laws directed toward stifling the nuclear industry. Also, as the Tenth Circuit emphasized, *Silkwood* and *English* relied on evidence of Congressional intent that the specific state law remedies in question be preserved. App. 39a. The opposite is true of the Utah statutes.

Contrary to Petitioners' assertions, the purpose of the state law is very important to the determination of

whether the state law in question is preempted. *English*, 496 U.S. at 84 (noting that "part of the pre-empted field is defined by reference to the purpose of the state law in question"). The preempted field is also defined by whether the state's law has some "direct and substantial effect on the decisions made by those who build or operate nuclear facilities concerning radiological safety levels." *Id.* at 85. The Tenth Circuit examined very carefully each of the laws the Utah officials sought to defend and ruled consistently with the preemption decisions of this Court, ruling that each is preempted by federal law.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court deny the petition for writ of certiorari.

Respectfully submitted, November 30, 2004.

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IN THE

Supreme Court of the United States

DIANNE R. NIELSON, in her official capacity as Executive Director of the Utah Department of Environmental Quality, *et al.*,
Petitioners,

v.

PRIVATE FUEL STORAGE, L.L.C., and SKULL VALLEY BAND OF GOSHUTE INDIANS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF FOR PETITIONERS

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IN THE

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REPLY BRIEF FOR PETITIONERS

The petition seeks review of the Tenth Circuit's sweeping preemption of five groups of state statutes that have not yet been applied to respondents, may never be applied, and can be applied without regulating radiological safety aspects of respondents' proposed (but not federally approved) facility, thus respecting the distinctly limited reach of preemption under the Atomic Energy Act. The case for review rests on the Tenth Circuit's violation of this Court's precedents, clear conflicts with other circuits, and the sheer importance of the Tenth Circuit's abrogation of state authority over real problems created by the proposed open-air nuclear waste storage facility in Utah. Respondents have supplied no meaningful answer.

The brief in opposition is an exercise in studied avoidance. It rewrites this Court's three preemption-limiting decisions on AEA preemption; disregards the Court's standard for facial preemption; never mentions the Court's key recent rulings on ripeness; tries to dismiss the intercircuit conflict by ignoring other circuits' express rationales; diverts attention from the state statutes actually at issue in favor of other provisions not at issue; and repeatedly declares, summarily, that the Tenth Circuit correctly reviewed the provisions at issue, but never offers any substantive discussion whatever to show that invalidation of each provision at issue comported with facial preemption standards. Respondents' choice so steadfastly to avoid grappling with the governing law, the specifics of the laws at issue, and the actual holdings of other circuits strongly confirms the error, and need for review, of the Tenth Circuit's blunderbuss displacement of vital state authority.

ARGUMENT

1. To defend the Tenth Circuit's ripeness conclusion, respondents have to ignore what this Court's governing precedents say about critical elements of the ripeness analysis, as if reciting "fitness" and "hardship" ended the analysis. Br. in Opp. 6-11. Respondents cite *Texas v. United States*, 523 U.S. 296, 300 (1998), but they ignore its clearly articulated principle that a claim is not ripe if it rests on contingent events that may never occur or may not occur as anticipated. Br. in Opp. 10. They never even mention the Court's two recent ripeness rulings, *National Park Hospitality Ass'n v. Department of the Interior*, 538 U.S. 803 (2003), and *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726 (1998), which make clear the insufficiency of legal uncertainty for the hardship element and the importance of avoiding foreclosure of agency opportunities to shape their potential actions to eliminate possible legal objections. *See* Pet. 16-18. The Tenth Circuit's ripeness ruling conflicts with the ripeness analysis of those decisions.

Two contingencies make respondents' claim unripe under the straightforward *Texas* principle. *First*, respondents may never receive federal approval for their project, in which case the Utah laws will not apply to them at all. Yet the Tenth Circuit nevertheless went ahead and swept away five groups of Utah laws. *Second*, the Utah laws at issue have not yet been applied to respondents; and how they will be applied, and what impact they will have, are profoundly uncertain. Although respondents insist that the laws are "self-executing" (Br. in Opp. 10), insisting cannot make it so. Respondents refuse to discuss the specifics of the provisions at issue—under which it has yet to be decided what if any requirements, beyond informational matters, will be included in the county plans; whether municipal services will be denied and, if so, whether respondents can readily fill the void on their own; what if any unfunded potential liability the State will determine and what effect that determination will have on equity investors, officers, and directors; what if any restrictions the State will place on use of the roads newly under its authority; what if any requirements, beyond informational or non-radiological safety ones, will be imposed in the state licensing process. Nor has any payment obligation under the licensing provisions been triggered, because respondents' project may fail to obtain federal disapproved, mooting the entire state licensing process. Pet. 5-7 (summarizing provisions at issue).

These undeniable contingencies not only make *Texas* applicable; the Utah-law contingencies also present the situation found key to lack of ripeness in *Ohio Forestry*, a decision that respondents simply ignore. The Utah laws at issue do not currently command or forbid respondents to do anything, and in each of the just-enumerated respects, Utah organs of government have not yet made the determinations that will settle how the provisions at issue will apply to respondents. *Ohio Forestry* recognizes that a central basis for the ripeness requirement is, in circumstances like the present, to protect

government agencies' opportunities to shape their own decisions to avoid alleged legal problems before federal courts jump in. Pet. 17. The intervention of the Tenth Circuit deprived Utah of that opportunity, although respondents undisputedly could challenge any application of particular provisions if and when it occurs.

As to hardship, respondents assert "immediate injury," Br. in Opp. 10, but they identify no present hardship, let alone a substantial one. They all but acknowledge the absence of any such present hardship when they cap their discussion by saying that "the *potential* effect" if the statutes are upheld "is certain." Br. in Opp. 11 (emphasis added). The effect is thus only a potential, not a present one. In the end, all that respondents (and the Tenth Circuit) rely on is respondents' uncertainty about their legal rights with respect to the Utah laws (which if valid respondents assert might render their NRC licensing efforts "futile"). Br. in Opp. 10. That uncertainty, however, is not a sufficient hardship under the clear ruling in *National Park Hospitality Ass'n* (quoted at Pet. 18) —a decision respondents never even cite, much less discuss.

Respect for these ripeness principles is at least as important where state laws are at issue as where federal laws are at issue. In this circumstance, federalism limits add to the institutional constraints on judicial review of government action generally. These principles should preclude review even of a question, like the facial preemption question here, that, properly formulated (are the laws *capable* of valid application?), can and should readily be answered *against* the challengers—though the intrusion on the State is of course less if the State prevails on the merits. Here, though, the Tenth Circuit did not properly formulate the question, but relied for its ruling on predictions about how the laws would be applied and what effects would follow (all without any factual record). *See* Pet. 15 & n.7. The Tenth Circuit decision thus violates fundamental ripeness principles.

2. On the merits of the preemption issue, respondents can defend the Tenth Circuit's ruling only by running from this Court's standards. *First*, they try to escape the clear articulation of the standard for facial preemption in *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987), *i.e.*, no possible valid application of the challenged state laws. *See* Pet. 20; *see also Department of Taxation and Finance of New York v. Milhelm Attea Bros., Inc.*, 512 U.S. 61 (1994). They contend that the standard is somehow tied to the threshold issue of "appeal" jurisdiction this Court decided in *Granite Rock*. Br. in Opp. 15-16. But there is no such dependency: the facial-preemption standard is laid out in sections of *Granite Rock* (480 U.S. at 581, 588, 593) separate from the jurisdictional discussion (*id.* at 579-80). Moreover, although respondents declare that they are not making a "purely facial challenge" (Br. in Opp. 16), they do not explain how that can be so. The laws at issue have not been applied to respondents, who, therefore, can only be making a facial preemption challenge.

The *Granite Rock* standard—followed in many circuits (where no issue of "appeal" jurisdiction exists), Pet. 28-29, as respondents do not deny—thus necessarily governs. Yet the Tenth Circuit did not frame its analysis in those terms, and respondents do not even attempt to show how the five groups of Utah laws at issue could fail under *Granite Rock*'s standard allowing facial preemption only if there is no possible set of valid applications. The petition shows how each set of Utah laws can be validly applied (Pet. 24-26), and respondents do not meet that showing. The Tenth Circuit decision thus necessarily violates the governing standard for facial preemption challenges.

Second, respondents also must ignore the actual AEA preemption standards laid out in this Court's decisions in *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983), *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), and *English v.*

General Elec. Co., 496 U.S. 72 (1990)—all of which rejected preemption claims. Respondents recognize that the Tenth Circuit's wholesale invalidation of the Utah laws at issue rests squarely on an understanding of the AEA as barring a State from having "an alternative regulatory process" applicable to nuclear facilities (Br. in Opp. 2) or from regulating in a way that is specific to nuclear facilities or "directed toward stifling" a nuclear facility (Br. in Opp. 14, 17). That view, however, is plainly contrary to *Pacific Gas*, *Silkwood*, and *English*. *See* Pet. 21-23.

Most starkly, *Pacific Gas* involved—and upheld—a state measure that was specific to nuclear facilities and on its face designed to stop them. The Court squarely held that, because the nuclear-targeted ban regulated a non-radiological safety aspect of such facilities, the State could legitimately target nuclear facilities and block them. *Pacific Gas* in terms, and by its holding, rejected respondents' broad no-dual-regulation, no-targeting-of-nuclear-projects, view of the AEA. *Silkwood* then recognized that Congress had also left to the States the area of monetary remedies for injuries, even injuries caused by jury-determined radiological safety deficiencies. As always, a case-specific conflict-preemption analysis remains available, with the focus on actual interference with federal objectives, as the Court explained, construing *English*, in *Gade v. National Solid Wastes Mgt. Ass'n*, 505 U.S. 88, 105 (1992). *See* Pet. 21-23.

The five groups of Utah laws at issue cannot possibly be condemned as incapable of valid application under those distinctly limited AEA preemption standards. Respondents make no attempt to argue otherwise. While diverting attention to provisions *not* at issue (Br. in Opp. 3 (contract provision)),[1] they never even discuss the specifics of the

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[1] As respondents are aware, Utah specifically told the Tenth Circuit that, once federal legal authority to license the facility was judicially

provisions actually at issue, let alone meet the petition's showing that every one of the five categories is, in fact, readily capable of valid application, *i.e.*, without regulating the radiological safety hazards of nuclear projects. Pet. 24-27. Respondents advert without elaboration to effects of the laws even before they have been applied (Br. in Opp. 16), but an argument about effects (especially a wholly speculative one, unsupported by any factual record) is a premature argument for conflict preemption based on the particular determinations Utah may make in applying the provisions—necessarily an as-applied argument that cannot support facial preemption.

Respondents, in short, recognize that the Tenth Circuit decision necessarily rests on the broad view of AEA preemption that they advance, which is in plain terms contrary to the governing law under this Court's precedents.

3. Respondents do not deny that other circuits apply the *Granite Rock* standard for facial preemption that the Tenth Circuit here disregarded. That is one doctrinal conflict. Respondents do seek to deny the conflict of the Tenth Circuit ruling with the AEA-specific decisions of the Second and Seventh Circuits. Br. in Opp. 12-14. The actual stated rationales of the decisions, however, unavoidably conflict with the Tenth Circuit's pre-application condemnation and its sweeping purpose-driven view of AEA preemption.

Kerr-McGee Chemical Corp. v. City of West Chicago, 914 F.2d 820 (7th Cir. 1990), rejected a facial challenge to a locality's requirement that a nuclear facility seek a permit. The Seventh Circuit stated the limited reach of AEA preemption: "the NRC has exclusive authority to regulate radiation hazards associated with the materials and activities covered by the AEA, but states and local agencies retain the right to

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confirmed, the contract provision would not be applicable at all. Utah CA Br. 20; Utah CA Reply Br. 39.

regulate non-radiation hazards." *Id.* at 825. It specifically refused to hold the permitting requirement invalid on the ground that it was masking true opposition to the facility. *Id.* at 827. And it rejected the challenge precisely because the terms of the permitting statute *allowed* the City to apply it validly, respecting the line defining AEA preemption, so that the challenger had to await actual application of the permit requirement to their facility. *Id.* at 826-27. The Tenth Circuit, had it followed that approach, could not have struck down the five groups of laws at issue—all of which are capable of being applied without regulating radiological safety. Pet. 24-26.

The Second Circuit's decision in *Citizens for An Orderly Energy Policy, Inc. v. County of Suffolk*, 813 F.2d 570 (2d Cir. 1987), by respondents' own description conflicts with the Tenth Circuit's decision. Respondents recognize that the Second Circuit decision rests on acknowledged congressional intent not to require local governments to lend assistance to nuclear projects, distinguishing affirmative local government interference with such projects. Br. in Opp. 14. As in *Kerr McGee*, (undisputed) allegations of a true motivation to oppose the project were not enough to support preemption. *See* Pet. 28. The Utah provision on refusing municipal services is plainly on the protected side of the *Citizens* line and thus squarely within an area left unpreempted by Congress. The Tenth Circuit could not have held otherwise had it followed the Second Circuit's *Citizens* decision.

4. Respondents ignore other factors supporting review. *First*, they say nothing about the fact that the Federal Government, while participating as *amicus* below, did not advocate ripeness or preemption in this case. Nor do they address the views expressed by the United States elsewhere that run counter to the Tenth Circuit's interventionist approach to preemption here. *See* Pet. 29-30.

Second, respondents fail to recognize that, in the AEA preemption arena, this Court has granted review even in the absence of a circuit conflict. There was no conflict alleged in support of certiorari in *Pacific Gas*. *See* Petition for Certiorari in No. 81-1945 (April, 20, 1982); Brief for the United States as *Amicus Curiae* in Nos. 81-1944, 81-1945 (May 22, 1982) (recommending grant; no mention of conflict). Nor was a conflict alleged in *Silkwood*. Jurisdictional Statement in No. 81-2159 (May 20, 1982). Indeed, the Court granted review of the Tenth Circuit's overbroad view of AEA preemption in *Silkwood* even though the Solicitor General's invitation brief recommended denial of review. *See* Brief for the United States as *Amicus Curiae* Supporting Appellees in No. 81-2159 at 35 (June 1983) (recommending summary affirmance if "appeal" was proper and denial of certiorari otherwise).

The Court explained the reasons it deemed sufficient to warrant review in *Silkwood*:

> The issue addressed by the court below is important; it affects both the States' traditional authority to provide tort remedies to their citizens and the Federal Government's express desire to maintain exclusive regulatory authority over the safety aspects of nuclear power.

464 U.S. at 248. In the present case, too, important state authority has been broadly displaced, including authority to ensure the availability of meaningful remedies for harm, and the boundaries of exclusive federal authority over the safety aspects of nuclear power have been newly expanded (even without the United States urging movement of those boundaries to trump the Utah laws at issue). Those consequences are particularly compelling reasons for review of the decision in this case, which sweepingly invalidates numerous measures responding to real problems caused by respondents' proposed major new nuclear facility, and which runs afoul not only of

this Court's AEA preemption standards but the principles governing ripeness and facial preemption more generally, and conflicts with other circuits' decisions.

CONCLUSION

For the foregoing reasons, and the reasons previously stated, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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SUPPLEMENTAL BRIEF FOR PETITIONERS

This Court should reject the Government's recommendation against granting certiorari in this case just as it rejected the similar negative recommendation in the Government's invitation brief in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984). *See* Pet. Reply Br. 9. Here, as there, the Tenth Circuit has intruded on prerogatives left to the States in a way that warrants review. Indeed, the intrusion here is much greater than in *Silkwood*. It encompasses not only an incorrect wholesale preemption of a raft of state laws under the Atomic Energy Act (AEA), but also a violation of the far more general ripeness and facial-challenge doctrines, which should have entirely barred adjudication of the state laws' validity right now—when the state laws have not been applied and may never be applied—and, in any event, should have precluded *facial* invalidation of the state laws as a whole—because the laws actually at issue are readily capable of valid application.

"Our federal system, with its high regard for the several states' powers of governance, requires that judges not preempt state laws lightly." K. Starr, P. Higginbotham, S. Seymour, W. Clark, J. Criswell & J. Sneed, *The Law of Preemption* 40 (1991). The Tenth Circuit's ripeness ruling, its disregard of facial-invalidity standards, and its sweeping view of AEA preemption all breach the vital principle barring needless federal court displacement of state law, as well as contradict decisions of this Court and other circuits. The Federal Government's brief, which at bottom rests on an over-expansive view of AEA preemption that this Court has already twice rejected (in *Silkwood* and in *Pacific Gas & Elec. Co. v. State Energy Resources Cons. & Dev. Comm'n*, 461 U.S. 190 (1983)), offers no sound basis for denying review of the Tenth Circuit's incautious, broad-brush abrogation of numerous state laws, which can be applied (if they ever will be applied) to serve traditional interests left to the States under the AEA.

I. RIPENESS

Two categories of serious contingencies make respondents' challenges unripe for adjudication: whether respondents' project will obtain the multiple needed federal approvals; and how the various state laws will be applied by Utah if and when all the federal approvals occur. Moreover, the record is literally devoid of evidence of hardship from postponing adjudication, let alone any hardship matched to each challenged law, because respondents presented no evidence. The Government's discussion of ripeness simply does not come to grips with these compelling reasons for avoiding the extraordinary act of global adjudication of Utah's multifarious state laws.

A. The Government does not deny that "at least two" (Pet. 4) federal approvals are needed for respondents' project. And, what is critical, it nowhere denies that there is genuine uncertainty about whether this singular project will obtain the federal approvals it needs. Thus, although the Nuclear Regulatory Commission has now authorized issuance of a license, the decision is subject to judicial challenge (SG Br. 6 n.2); in addition, multiple contingencies remain at the Department of the Interior—approvals routed through the Bureau of Indian Affairs and through the Bureau of Land Management.[1] The Government rightly does not predict how those processes, which may take years, will turn out.

The case is thus sharply different from *Pacific Gas*, where not only was the effect of the state-law moratorium undisputed (it banned new power plants because there *was* no adequate waste-storage plan) but there was also no stated uncertainty that federal approvals for all power plants might

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[1] The latter is subject to a federal statute requiring Defense Department studies before Interior takes certain steps to alter resource management plans for "Utah national defense lands" that, like the site here (Pet. 4), are near the military's Utah Test and Training Range and Dugway Proving Ground. National Defense Authorization Act for Fiscal Year 2000, § 2815, Pub. L. No. 106-65, 113 Stat. 512, 852.

be withheld so as to moot the issue of the state ban. *See* Pet. 18. Here, both forms of uncertainty are serious ones, thus defeating the Government's effort (SG Br. 7 n.3) to distinguish the plain principle of *Texas v. United States*, 523 U.S. 296, 300 (1998), quoted at Pet. 16.

Moreover, there is simply no evidence of hardship to respondents before obtaining the needed federal approvals: respondents literally introduced no such evidence whatever. Pet. 8. In the absence of *any* concrete evidence, all that is left is the abstract lawyers' argument, of near universal applicability, that legal uncertainty creates hardship for a party contemplating action dependent on the resolution of that uncertainty. That is precisely what this Court said in plain terms was not enough in *National Park Hospitality Ass'n v. Department of the Interior*, 538 U.S. 803, 811 (2003), quoted at Pet. 18, as confirmed by the Ninth Circuit in *Natural Resources Defense Council v. Abraham*, 388 F.3d 701, 706 (9th Cir. 2004). This Court should correct the Tenth Circuit's finding of ripeness when it is genuinely uncertain whether a ruling will ever matter and there is no evidentiary showing of concrete hardship from waiting before the federal court performs the delicate task of adjudicating the validity of state statutes.

B. The Government barely mentions the entire second category of contingencies—how the state laws will be applied. What it does say is flawed for at least two reasons over and above its wholly unsupported assertion (without any evidentiary record) that the laws are "highly burdensome and costly" and would lead to abandonment of the project if upheld (SG Br. 9).

First, the Tenth Circuit decision, like the Government's brief, treats "[t]he challenged Utah statutes" (SG Br. 9) in wholesale fashion. But ripeness analysis requires separate consideration of the various state laws. *Pacific Gas* separately analyzed the ripeness of AEA-preemption challenges to

two California provisions enacted as part of the same legislation (the 1976 Warren-Alquist Act), 461 U.S. at 197-98, and found one ripe for adjudication and the other not. 461 U.S. at 201-03. The Government, like the Tenth Circuit, has not separately addressed ripeness for each law at issue.[2]

Second, and more broadly, the Government wholly ignores one vital policy of ripeness doctrine, generally applicable but of heightened importance in *state*-law cases: allowing the administrators of the challenged law to act in a way that avoids the potential problems. That policy was stressed by this Court as an essential component of ripeness analysis in *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726 (1998), *see* Pet. 16-17, and the Government itself successfully invoked it in *Abraham*, 388 F.3d at 705-07. *See* Brief for Appellants, 2004 WL 545961, at 15-20. The Tenth Circuit decision conflicts with that important policy, because how the various Utah laws will be applied (if they are ever applied) is subject to numerous uncertainties—which are summarized at Reply Br. 3, but not addressed by the Government. Those uncertainties explain the wholly unsupported and abstract character of assertions of harm and conflict with federal policy in this case, making this case a good example of the need to await application before adjudication.

This Court in *Schiro v. Smith*, 74 U.S.L.W. 3246, No. 04-1475 (Oct. 17, 2005), recently confirmed the strength of the principle that federal courts should not displace state authority, in the name of federal law, in advance of the State's

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[2] The Government, discussing harm, cites one Utah provision as having played a role in an NRC proceeding (SG Br. 8), but that provision, as Utah expressly told the Tenth Circuit, will *not* apply to respondents' project if federal authority to authorize that project is confirmed, and hence cannot impose any hardship on respondents. *See* Pet. 6, 24-25. That provision serves legitimate interests, *see* Pet. 24 & n.10; *United States v. Olson*, No. 04-759 (S. Ct. Nov. 8, 2005), slip op. 4 (Good Samaritan liability), but never should have been reached by the Tenth Circuit.

application of its authority in a particular case. Although *Schiro* and this case arise in different contexts, the principle is the same. *Schiro* involved a federal habeas petition from an Arizona prisoner who alleged that he was mentally retarded and therefore protected from execution under *Atkins v. Virginia*, 536 U.S. 304 (2002). After the Ninth Circuit ordered Arizona to use a jury to decide the prisoner's mental capacity (unless jury trial is waived), this Court summarily vacated the Ninth Circuit decision, explaining that *Atkins* left the initial choice of implementation measures to the States and

> "[w]hile those measures might, in their application, be subject to constitutional challenge, Arizona had not even had a chance to apply its chosen procedures when the Ninth Circuit preemptively imposed its jury trial condition." Slip op. 2, 74 U.S.L.W. 3246.

Here, Utah has not even had a chance to apply its various laws. When Utah does apply its laws, those applications "might, in their application, be subject to constitutional challenge" under the Supremacy Clause; but at present, the Tenth Circuit acted improperly when it "preemptively imposed" its view of federal-law constraints. *Id.*

II. PREEMPTION

A. The Government defends the Tenth Circuit's failure to follow the usual strict standard for facial challenges by trying to distinguish *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987), on two grounds. It states that the federal law at issue there "contemplated state regulation" in the area; and, more categorically, it says that *Granite Rock* "did not involve any issue of *field* preemption." SG Br. 11-12 (emphasis by Solicitor General). But the first point is no distinction at all: *Pacific Gas* and *Silkwood*, in rejecting preemption challenges, make clear that the AEA contemplates that some state laws permissibly apply to nuclear facilities and others do not, thus requiring, as in *Granite*

Rock, a judgment about which of the particular state laws fall on which side of the line. And the Government's broader point, that facial invalidation standards do not apply to *field* preemption, is baseless.

Contrary to the Government's apparent suggestion, the strict standards for facial challenges are not somehow peculiar to conflict preemption, or even to preemption law. They govern invalidity challenges generally, whether they rest on the Supremacy Clause or anything else. While there are certain overbreadth exceptions to the rule that facial invalidation requires invalidity in all applications—for First Amendment claims, perhaps in the abortion area (an issue pending in *Ayotte v. Planned Parenthood of Northern New England*, No. 04-1144)—the Court has stressed the breadth of the rule and the important reasons to limit exceptions, which in no way cover an AEA preemption claim. *Sabri v. United States*, 124 S. Ct. 1941, 1948 (2004). The Government itself, in *Ayotte*, vigorously and categorically endorsed the broad applicability of the strict standard for facial invalidation.[3] As for the idea that a federal court may globally invalidate a host of state laws on their face, even those which would be valid, and force the State to try again with a more "narrowly tailored" approach (SG Br. 14 & n.6), the suggestion simply turns on their head the federalism and separation-of-powers principles that underlie the facial-challenge standard as applied to state laws.

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[3] The Government wrote: "Under the standard articulated in *United States v. Salerno*, 481 U.S. 739 (1987), a plaintiff bringing a facial challenge to a statute (and thus seeking to render it void in all its applications) must demonstrate that the statute is in fact invalid in all its applications." U.S. *Amicus* Brief in No. 04-1144 (August 2005), at 7; *id.* at 9 ("The 'No Set of Circumstances' Test Is The Correct Test For Facial Challenges"); 10 ("the *Salerno* standard is compelled by core limitations on the scope of the judicial power, as well as broader separation-of-powers principles"). Even if an exception to the facial-invalidation standard applies in *Ayotte*, no comparable departure can be justified for the present commercial context without destroying the standard altogether.

The Tenth Circuit did not apply the governing facial-challenge standard. Its decision conflicts with other circuits' decisions, because the Government distinguishes them only on the same two grounds on which it incorrectly seeks escape from the facial-challenge standard. SG Br. 12 n.5. And, unless corrected, the Tenth Circuit decision will invite further overbroad federal court inurusions on state prerogatives.

B. The Government's remaining position on the merits rests on its persistence in pressing an over-aggressive view of AEA preemption, one that cannot be squared with the decisions of this Court or other circuits. The Government's brief pervasively relies on three alleged features of the Utah laws as sufficient for preemption: that they apply only to ("target") a nuclear facility; that their motivation (aim, purpose) is to block such a facility; and that they are "motivated by concerns about nuclear safety" (SG Br. 12). *See id.* at 10-19. None of these allegations, however, supports AEA preemption.

The first two grounds are conclusively rebutted by *Pacific Gas*. Although the Government seems to suggest otherwise (SG Br. 13-14), the California law at issue in *Pacific Gas* on its face (a) was utterly specific to ("targeted" at) nuclear power plants and (b) blocked their construction. Yet this Court upheld the law against AEA preemption, because the law served a legitimate state interest other than (though obviously intertwined with) the regulation of safety: avoiding the adverse economic consequences of operating a nuclear plant without satisfactory nuclear-waste disposal. Moreover, despite the Government's attempt to suggest otherwise (SG Br. 17-18), not only *Pacific Gas* but decisions of the Seventh and Second Circuits (*see* Pet. 27-28; Pet. Reply Br. 7-8) make clear that a motivation to block a nuclear facility is not a basis for preemption.

Silkwood, too, precludes preemption of state impositions on the ground that they are focused specifically on a nuclear facility. *Silkwood* upheld the authority of juries acting under

state law not only to award compensatory damages but even to award punitive damages for injuries caused by what the jury determined to be radiological safety deficiencies at a particular nuclear facility. No law or logic allows an individual jury, "a quintessential governmental body" exercising "the power . . . of the government that confers the court's jurisdiction" (*Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 624 (1991)), to make such facility-specific judgments, about safety practices and the provision of proper monetary relief, yet precludes the State itself from making such judgments (which the liability laws at issue here do). What matters is the nature of the action taken—providing damages, in *Silkwood*—not how "targeted" it is (SG Br. 13) or whether the standards pre- or post-date the 1950s AEA.

The Government's position therefore comes down to its view that a "motivat[ion] by concerns about nuclear safety" suffices for preemption. SG Br. 12. But that is not the law. *Silkwood* squarely preserved state authority to take a certain type of governmental action (providing damages, even punitive damages) based specifically on such concerns. Even the passage from *English v. General Elec. Co.*, 496 U.S. 72 (1990), quoted by the Government (SG Br. 12) makes "purpose" merely "relevant" (SG Br. 13): it says that "part of the pre-empted field is defined by reference to the purpose of the state law," 496 U.S. at 84, without saying that safety-based concerns that partly motivate an overall enactment invalidate each particular measure in that enactment regardless of what each such measure actually *does*. Moreover, this Court in *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 105 (1992), treated what the laws actually *did* (there, regulate worker safety practices) as dispositive, and immediately following its quotation from *English*, the Court said: "we have refused to rely solely on the legislature's professed purpose." *See also id.* at 107.

In short, what matters under this Court's decisions is whether each provision at issue (as applied) falls inside or outside the specific category the AEA walls off to States—a category limited to regulating nuclear safety, and *excluding* not only provision of compensation, or even punitive damages, for harms caused even by nuclear safety deficiencies, but regulation of the whole range of economic and other matters besides nuclear safety. Under that standard, the laws at issue here, in what they actually do (and in what interests they serve), all pass muster. Although the Government suggests otherwise (SG Br. 13), the petition identifies legitimate interests served by many of the Utah laws that the Tenth Circuit invalidated without individual examination. Pet. 24-27. Importantly, those interests must be taken at face value here: respondents brought only a pre-application facial challenge, asserted only field, not conflict, preemption, and submitted no evidence whatever to establish a conflict with particular NRC or other federal policies. The Government's allusions to such particular federal decisions or policies (SG Br. 14, 15), and bare assertions about the laws' impacts, are simply misplaced in this case at this time.

For example, as to Utah's county planning laws, nothing in the AEA forbids States to impose informational requirements, including those about nuclear hazards, so that people can make informed decisions about, say, whether to move out of the area; nor are States barred from pursuing land use and environmental interests. And it is hard to imagine why the AEA would bar a State from charging one of its own internal governmental subdivisions with making plans to protect its citizens (*contra* SG Br. 16-17). (As to the municipal-services provision, see note 2, *supra*.) The several provisions governing liability serve the interest, clearly preserved to the States under *Silkwood*, of ensuring payment for harms that the facility may cause, including (but not only) those from radiation hazards. Particular bonding or fee requirements that are part of the state licensing process likewise address costs imposed by

the project (without a factual record, there cannot be a question of excessiveness here), and other licensing requirements clearly address various informational and other non-nuclear-safety interests. Finally, the provisions merely re-assigning authority over particular roads serve the obviously legitimate interest in ensuring that decisions are made at a high enough government level to reflect all the interests affected by this project, economic and otherwise, which extend well beyond a particular county. *See* Pet. 24-27.

Once the Government's incorrect "targeting" position is put aside, it lacks any answer to the facial sufficiency of these interests. SG Br. 13-17. Any challenges, therefore, must await application of the laws and development of a factual record. The Tenth Circuit's contrary decision dramatically lowers ripeness and facial-challenge thresholds for federal-court action and vastly expands AEA preemption. The decision should be reviewed and reversed.

CONCLUSION

The petition for a writ of certiorari should be granted.

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No. 04-575

In the Supreme Court of the United States

DIANNE R. NIELSON, EXECUTIVE DIRECTOR, UTAH DEPARTMENT OF ENVIRONMENTAL QUALITY, ET AL., PETITIONERS

v.

PRIVATE FUEL STORAGE, L.L.C., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether a challenge to Utah's scheme for the regulation of a privately developed spent nuclear fuel storage facility was ripe for judicial review.

2. Whether Utah's scheme is preempted by the Atomic Energy Act of 1954, 42 U.S.C. 2011 *et seq.*

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In the Supreme Court of the United States

No. 04-575

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v.

PRIVATE FUEL STORAGE, L.L.C., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

Following a publicly-announced proposal by respondents, a private consortium of electric utilities and an Indian tribe, to develop a storage facility for spent nuclear fuel on Indian land in the State of Utah, the State enacted a series of comprehensive and interrelated statutes to ban or limit the storage and transportation of spent nuclear fuel. The Tenth Circuit held that respondents' challenge to those statutes was ripe for review and that most of the statutory provisions were preempted by the Atomic Energy Act of 1954 (AEA), 42 U.S.C. 2011 *et seq.* Those

rulings are correct and do not warrant further review by this Court.

1. In the AEA, Congress vested the Nuclear Regulatory Commission (NRC) with "exclusive jurisdiction to license the transfer, delivery, receipt, acquisition, possession and use of nuclear materials. Upon these subjects, no role was left for the states." *Pacific Gas & Elec. Co.* v. *State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 207 (1983) (citations omitted); *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 249-250 (1984). The AEA also preempts state laws that have a purpose to address "protection against radiation hazards," 42 U.S.C. 2021(k), or that have a "direct and substantial effect on the decisions made by those who build or operate nuclear facilities concerning radiological safety levels." *English* v. *General Elec. Co.*, 496 U.S. 72, 85 (1990).

Spent nuclear fuel (SNF), which is highly radioactive, must periodically be removed from commercial nuclear reactors. *Pacific Gas*, 461 U.S. at 195-196. "While the AEA does not specifically refer to the storage or disposal of spent nuclear fuel, it has long been recognized that the AEA confers on the NRC authority to license and regulate the storage and disposal of such fuel." *Bullcreek* v. *NRC*, 359 F.3d 536, 538 (D.C. Cir. 2004). Pursuant to the AEA, the NRC has promulgated regulations providing a comprehensive procedure for the licensing of *temporary* SNF storage installations in order to ensure safe storage of the material. 10 C.F.R. Pt. 72. Congress addressed the *permanent* disposal of SNF (as well as high level radioactive waste) in the Nuclear Waste Policy Act of 1982, 42 U.S.C. 10101 *et seq.*, which provides for the study and eventual development of a permanent geologic repository. *Nuclear Energy Inst., Inc.* v. *EPA*, 373 F.3d 1251, 1258-1262 (D.C. Cir. 2004).

"As of 2003, nuclear reactors in the United States had generated approximately 49,000 metric tons of spent nuclear fuel. Most of this waste is currently stored at reactor sites across the

country. * * * By the year 2035, the United States will have produced 105,000 metric tons of nuclear waste—approximately twice the current inventory." *Nuclear Energy Inst.* v. *EPA*, 373 F.3d at 1258 (citations omitted). Facilities for the storage and disposal of SNF are therefore essential to sustain the viability of nuclear power as an energy source. *Pacific Gas*, 461 U.S. at 195-196 & n.2.

Since 1997, respondent Private Fuel Storage (PFS) has sought a license from the NRC to build and operate a temporary SNF storage facility on Utah land belonging to respondent the Skull Valley Band of Goshute Indians that is located southeast of Salt Lake City. Pet. App. 4a, 56a. The proposed facility would provide storage capacity for utilities that seek offsite storage of the SNF, until such time as the permanent geologic repository is operational. Expressing specific concern about the safety of PFS's efforts, Utah passed a series of statutes between 1998 and 2001 that the courts below found were designed to block the proposed facility. *Id.* at 5a, 37a, 47a, 49a-50a, 52a, 56a-57a, 63a. They are summarized briefly below.

a. *Utah's Licensing Regulations.* Part 3 of Utah's Radiation Control Act requires a SNF storage facility that has been licensed by the NRC also to obtain a state license for construction and operation. Utah Code Ann. § 19-3-304. The licensing scheme requires extensive analysis of health and safety issues related to the storage of SNF. *Id.* §§ 19-3-301(2)-(4), 19-3-304 to 19-3-307. The applicant also must provide Utah's Department of Environmental Quality (DEQ) with extensive information related to health and safety aspects of the proposed installation. *Id.* § 19-3-305. The license may not be issued unless DEQ finds the information in the application sufficient to support a variety of specific findings related to the health and safety effects of the facility. *Id.* § 19-3-306. The applicant must satisfy DEQ, for example, that "the wastes will not cause or contribute to an increase in mortality, an increase in illness, or pose a pres-

ent or potential hazard to human health or the environment." *Id.* § 19-3-306(3). The applicant must also provide information on topics such as groundwater, security plans, quality assurance programs, radiation safety programs, and emergency plans. *Id.* § 19-3-305. All of those areas are regulated by the NRC under 10 C.F.R Part 72 in order to protect human health and safety and the environment.

Part 3 also imposes substantial application and licensing fees. The applicant must pay a non-refundable "initial fee" of $5 million and thereafter "shall * * * pay an additional fee to cover the costs to the state associated with review of the application, including costs to the state and the state's contractors for permitting, technical, administrative, legal, safety, and emergency response reviews, planning, training, infrastructure, and other impact analyses, studies, and services required to evaluate a proposed facility." Utah Code Ann. § 19-3-308(1)(a) and (b). The applicant must also post a bond of "*at least*" $2 billion, or "a greater amount as determined * * * to be necessary to adequately respond to," among other things, "any reasonably foreseeable releases." *Id.* § 19-3-306(10) (emphasis added).

b. *Unfunded liability payment.* Part 3 further requires the operator of an SNF storage facility to pay to the State an amount equal to 75% of the "unfunded potential liability" of the project. Utah Code Ann. § 19-3-319(3)(a). That amount will be determined by DEQ based upon the health and economic costs expected to result from "a reasonably foreseeable accidental release" of SNF. *Id.* § 19-3-301(5)(a). Under those provisions, the DEQ may require payment of an additional amount above the level of insurance that the NRC decides to require in the project license. Pet. App. 44a-45a.

c. *Revocation of limited liability.* Part 3 also revokes statutory and common-law limited liability for officers, directors, and equity-interest owners of companies operating SNF storage facilities in Utah. Utah Code Ann. § 19-3-318.

d. *County planning requirements and the prohibition on providing municipal services.* Utah's legislation also includes county planning requirements. Pet. App. 36a, 75a. Among other things, county governments must either ban the storage and transportation of SNF, or adopt a comprehensive land use plan containing detailed information regarding the effects of any proposed SNF site upon public health and welfare. Utah Code Ann. § 17-27-301. The plan also must include "specific measures to mitigate the effects of high-level nuclear waste and greater than Class C radioactive waste and guarantee the health and safety of the citizens of the state." *Id.* § 17-27-301(3)(a)(iii). In addition, a county "may not provide, contract to provide, or agree in any manner to provide municipal-type services * * * to any area under consideration for a storage facility or transfer facility for placement of high-level nuclear waste, or greater than Class C radioactive waste." *Id.* § 17-34-1(3).

e. *Transportation provisions.* Utah also enacted provisions related to roads and railroad crossings that may be needed for access to an SNF storage facility in Utah. Utah Code Ann. §§ 54-4-15, 72-3-301, 72-4-125(4), 78-34-6(5); Pet. App. 8a-9a. One of the provisions divests the county of control over the only road providing access to PFS's proposed SNF storage facility, by designating the road a state highway. Utah Code Ann. § 72-4-125(4); Pet. App. 8a. Another provision requires that, before a disputed petition for a railroad crossing filed by an entity engaged in SNF storage may be resolved, the Governor and the state legislature must concur in the decision—a requirement that is imposed only on entities engaged in SNF storage. Utah Code Ann. § 54-4-15(4)(b); Pet. App. 8a.[1]

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[1] Utah also passed certain provisions that require drug and alcohol testing of employees of companies engaged in SNF storage and authorize litigation to determine water rights in areas under consideration for SNF storage. The district court rejected respondents' Commerce Clause challenge to those provisions, Pet. App. 77a-80a, and that ruling was not appealed. *Id.* at 5a.

2. Respondents challenged Utah's statutes in the United States District Court for the District of Utah, arguing, *inter alia*, that they were preempted by the AEA. In July 2002, the district court issued an order holding that respondents had standing to sue, that their claims were ripe for review, and that the relevant statutes were preempted by the AEA. Pet. App. 54a-77a.

3. The court of appeals affirmed. Pet. App. 1a-53a. The court held that respondents' preemption claims were ripe for review because the question of preemption is predominately legal and therefore fit for judicial resolution. *Id.* at 23a-24a. The court also reasoned that postponing review would impose a substantial hardship on the parties. *Id.* at 24a. On the merits, the court affirmed the district court's holding that the challenged statutes regulated in the area of nuclear safety and therefore were preempted. *Id.* at 25a-53a.

DISCUSSION

The court of appeals applied well-established legal principles governing ripeness and preemption to the unique circumstances of this case and concluded that Utah's statutory scheme is preempted. That decision is correct, and does not conflict with any decisions of this Court or any court of appeals. Further review is not warranted.

A. The Ripeness Question Does Not Merit Review

Petitioners argue (Pet. 14-19) that respondents' challenge to its regulatory scheme is premature because the proposed project has not received two necessary federal approvals for the project and because the State has yet to apply its laws to the proposed facility. Although additional steps remain before the project may go forward, the challenge nonetheless is ripe, and in any event, the ripeness issue does not warrant this Court's review.[2]

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[2] On September 9, 2005, the NRC concluded the licensing proceeding and authorized its staff to issue PFS a license. *Private Fuel Storage, L.L.C.*, No.

In determining whether a particular claim is ripe, courts traditionally examine both the "fitness of the issues for judicial decision" and the "hardship to the parties of withholding court consideration." *Pacific Gas*, 461 U.S. at 201 (quoting *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 149 (1967)). Applying those principles, the Court in *Pacific Gas*, 461 U.S. at 201-202, held ripe for judicial review a preemption challenge brought by utilities to a state moratorium on construction of nuclear power plants until the State certified the availability of permanent waste disposal. The Court explained that "[t]he question of preemption is predominantly legal, and although it would be useful to have the benefit of [the State's] interpretation of [the relevant statute], resolution of the pre-emption issue need not await that development." *Id.* at 201. The Court also explained that "postponement of decision would likely work substantial hardship on the utilities" because the utilities would have to expend millions of dollars in proceeding with constructing a facility without knowing whether the State ultimately would block its operation. *Ibid.* Having found the challenge ripe, the Court concluded that the state moratorium was not preempted. *Id.* at 203-223.[3]

72-22-ISFSI (CLI-05-19). That decision will likely be the subject of judicial review proceedings. Moreover, the Department of Interior advises that although the Bureau of Indian Affairs conditionally approved the lease between PFS and the tribe in May 1997, several outstanding contingencies, such as the preparation of an environmental impact statement, remain before the lease can receive final approval. As explained in the text, however, the court of appeals correctly found respondent's challenge ripe because final federal approval is not needed to render the legal issues fit for judicial resolution and delay would impose a substantial hardship on respondents.

[3] Petitioners erroneously rely on *Texas* v. *United States*, 523 U.S. 296 (1998), for the proposition that a case is never ripe if there are any outstanding contingent events. Pet. 16-17. Indeed, the Court in *Pacific Gas* found the preemption challenge to the waste disposal regulations ripe for review notwithstanding that the State had yet to deny certification and the NRC had yet to issue a license to the utilities. See 81-1945 Resp. Br. at 22-24. Moreover,

By contrast, the Court in *Pacific Gas* found *not* ripe the utilities' challenge to a state law requiring utilities, on a case-by-case basis, to demonstrate adequate on-site interim storage capacity. The Court explained that, in any given case, the State may determine that a plant's storage capacity is adequate, and that resolution of the utilities' challenge to the case-by-case provision would not remove any uncertainty concerning the construction of power plants because, in light of the Court's holding on the merits that the moratorium was not preempted, the utilities would experience uncertainty regardless of whether the validity of the case-by-case law was addressed immediately. 461 U.S. at 203.

Here, the court of appeals properly applied settled principles governing the determination whether a particular controversy is ripe and found that respondents' preemption challenges "were primarily legal ones" and that state law "subjected PFS to immediate harm in the NRC licensing proceeding." Pet. App. 22a. The court pointed out that, in the proceedings before the NRC, Utah "had invoked the statutory provision prohibiting county officials from providing services to SNF storage facilities" as an asserted basis for opposing an NRC license. *Ibid.*[4]

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in *Texas*, the Court held that "we find it too speculative whether the problem Texas presents will ever need solving; we find the legal issue Texas raises not yet fit for our consideration, and the hardship to Texas of biding its time insubstantial." 523 U.S. at 302. As explained *infra*, none of those factors is present in this case.

[4] After the district court's decision, the NRC's Atomic Safety and Licensing Board rejected the State's contention on the ground that Utah's laws "have no effect because they are unconstitutional." *Private Fuel Storage, L.L.C.*, 56 N.R.C. 169, 184 (2002). The NRC denied the State's request for review, concluding that Congress "clearly intended the federal government to occupy the field of regulating the safety of atomic energy," and that "Utah's laws seemingly amount to an attempt to make it impossible for any applicant to obtain an NRC * * * license." *Private Fuel Storage, L.L.C.*, 59 N.R.C. 31, 37 (2004).

Moreover, as with the moratorium in *Pacific Gas*, respondents faced real uncertainty in light of the challenged statutes. As the court of appeals explained, "[t]o delay a decision would impose upon [respondents] the uncertainty of not knowing whether they will be required to incur the substantial expenses and comply with the numerous regulatory requirements imposed by the Utah statutes." Pet. App. 24a. Thus, as the district court found, should the state laws be upheld, it was "more likely than not PFS would not proceed with the construction of the proposed facility." *Id.* at 23a (quoting district court opinion, *id.* at 63a). It was accordingly proper for the courts below to determine whether respondents could pursue an NRC license without interference from allegedly preempted state laws. *Id.* at 22a-24a.

Petitioners also err in contending that, under *National Park Hospitality Ass'n* v. *Department of the Interior (NPHA)*, 538 U.S. 803 (2003), uncertainty about the law can never constitute hardship. Pet. 17-18. In *NPHA*, the challenged regulation expressed the National Park Service's *non-binding* view that disputes arising out of its contracts with concessionaires would not be subject to the Contract Disputes Act of 1978. 538 U.S. at 804-806. The Court explained that the regulation reflected a general statement of agency policy that "'create[s] no legal rights or obligations'" and "leaves a concessioner free to conduct its business as it sees fit." 538 U.S. at 809, 810 (quoting *Ohio Forestry Ass'n* v. *Sierra Club*, 523 U.S. 726, 733 (1998)). The challenged Utah statutes in this case, by contrast, are binding laws that impose immediate obligations on third parties (*e.g.*, local government officials) and impose a highly burdensome and costly scheme such that PFS, even were it to receive federal approval, would not construct or operate the proposed facility. Although aspects of that scheme are contingent on the grant of federal approval for the project, the Utah legislation nonetheless was intended to and did immediately and substantially affect the viability of the PFS project. Pet. App. 17a, 24a. Accordingly, like the morato-

rium in *Pacific Gas* and unlike the case-by-case capacity regulation there, the uncertainty surrounding Utah's scheme directly affects respondents' decisionmaking.

The Tenth Circuit's holding is also entirely consistent with *Ohio Forestry Ass'n, supra*, relied upon by petitioner. Pet. 16-18. The Forest Plan at issue in *Ohio Forestry* did "not command anyone to do anything or to refrain from doing anything," and "create[d] no legal rights or obligations." 523 U.S. at 733. Moreover, the plan was implemented through site-specific decisions, and the Court therefore concluded that assessment of the plan's impacts should occur in the context of a site-specific challenge. *Id.* at 734; cf. *Pacific Gas*, 461 U.S. at 203. Here, by contrast, no further factual development was needed for the courts below to determine that the State had legislated in a preempted field of federal law by enacting a series of binding and burdensome laws to protect against what the State perceived to be an unacceptable risk of radiation hazards. Moreover, *Ohio Forestry* did not involve the type or extent of hardship at issue here.

B. The Court Of Appeals' Application Of Field Preemption Principles To The Circumstances Of This Case Does Not Merit Review

On the merits of the preemption issue, petitioners argue that the court of appeals' decision violates the standards for facial preemption of state law, because respondents allegedly have not shown that the state laws are invalid in *all* of their applications. Pet. 13. Petitioners thus fault the courts below for not determining whether any of the laws could be validly applied to serve interests other than the regulation of radiological safety. Pet. 19-27. But this is not a case where generally applicable safety laws are preempted as applied to a federally-preempted field, like nuclear safety regulation. Here, the lower courts found that the entirety of the series of interrelated laws at issue here were targeted specifically to regulate the safety aspects of the proposed

waste facility and were designed to halt the construction and operation of the proposed facility based on radiation hazard concerns. In light of those factual determinations, the decision to find the entire statutory scheme preempted on its face is correct. Moreover, the case-specific determination of the lower courts does not merit this Court's review and is correct in any event.

1. "[S]tate law is pre-empted where," *inter alia*, "it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively." *English*, 496 U.S. at 79. When Congress so intends, it is said to have preempted the "field," *ibid.*, and thus a state law addressed specifically to the pre-empted field is invalid on its face, *i.e.*, in all of its applications. "When the federal government completely occupies a given field or an identifiable portion of it, * * * the test of [field] pre-emption is whether 'the matter on which the State asserts the right to act is in any way regulated by the Federal Act.'" *Pacific Gas*, 461 U.S. at 212-213 (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947)).

Congress has preempted the field of nuclear safety regulation. *Pacific Gas*, 461 U.S. at 212-213; *English*, 496 U.S. at 82. As the Court has explained, "[s]tate safety regulation is not preempted only when it conflicts with federal law[;] [r]ather, the federal government has occupied the entire field of nuclear safety concerns." *Pacific Gas*, 461 U.S. at 212. Thus, the AEA preempts *any* state legislation that falls within "the field of nuclear safety concerns." *Id.* at 212-213; accord *id.* at 208 ("the safety of nuclear technology [is] the exclusive business of the federal government").

For those reasons, petitioners err in relying on *California Coastal Commission* v. *Granite Rock Co.*, 480 U.S. 572, 588-589 (1987), in which the Court held that a state permitting scheme was not facially preempted because it was possible that the scheme could be implemented as an exercise of permissible environmental regulation. That decision did not involve any issue of

field preemption, and thus sheds no light on the question presented in this case. *Id.* at 589 (noting that field preemption was "concededly not the case"). Moreover, the Court emphasized that the allegedly preempting federal regulations specifically contemplated state regulation in the field of environmental protection, which is, of course, a contemplation at odds with any theory of field preemption. *Id.* at 583-589. Here, by contrast, the federal government exclusively regulates the field of nuclear safety and the "licens[ing] [of] the transfer, delivery, receipt, acquisition, possession, and use of nuclear materials." *Pacific Gas*, 461 U.S. at 207.[5]

2. In this case, the court of appeals carefully reviewed Utah's statutory scheme and determined that it was targeted to and regulated exclusively in the preempted field of nuclear safety. The Tenth Circuit specifically found that Utah's statutes were motivated by concerns about nuclear safety and directly addressed the field of radiation hazards. Pet. App. 37a, 47a, 49a-50a, 52a. Although petitioners argue that Utah's purpose in protecting against radiation hazards does not bring the challenged legislation within the preempted field, Pet. 22-23, there is no basis for this Court to reconsider its statement in *English* that "part of the pre-empted field is defined by reference to the purpose of the state law." *English*, 496 U.S. at 84; see 42 U.S.C. 2021(k) ("Nothing in this section shall be construed to affect the

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[5] For similar reasons, petitioners err in relying on lower court decisions that declined to find a law preempted in areas of the law other than the field of nuclear safety. Pet. 28-29. None of those decisions involved field preemption. Rather, the area asserted to be preempted contemplated the operation of state law. *Pharmaceutical Research & Mfrs. of Am.* v. *Concannon*, 249 F.3d 66 (1st Cir. 2001), aff'd, 538 U.S. 644 (2003); *Natural Res. Def. Council* v. *Houston*, 146 F.3d 1118 (9th Cir. 1998), cert. denied, 526 U.S. 1111 (1999); *Pentel* v. *City of Mendota Heights*, 13 F.3d 1261 (8th Cir. 1994); *Chemical Specialities Mfrs. Ass'n* v. *Allenby*, 958 F.2d 941 (9th Cir.), cert. denied, 506 U.S. 825 (1992); *Baltimore & Ohio R.R.* v. *Oberly*, 837 F.2d 108 (3d Cir. 1988); *Esso Standard Oil Co.* v. *Department of Consumer Affairs*, 793 F.2d 431 (1st Cir. 1986).

authority of any State or local agency to regulate activities for *purposes* other than protection against radiation hazards.") (emphasis added). Quite to the contrary, the Court subsequently has reaffirmed the rule in *English* that purpose is relevant and has made clear that a State cannot avoid preemption simply by "articulat[ing] a purpose other than (or in addition to)" the prohibited purpose. *Gade* v. *National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 105 (1992). Thus, when a State enacts legislation based upon "nuclear safety concerns," the laws are preempted without the need to demonstrate their effect. *Pacific Gas*, 461 U.S. at 212-213.

With respect to Utah's licensing scheme, petitioners fault the court of appeals for focusing "only on certain radiological-safety measures" that pervaded Utah's licensing scheme, when the "informational" and fee requirements could conceivably serve some non-safety interests of the State. Pet. 12, 26; accord Pet. 24. Although petitioners apparently concede that "certain" of the State's licensing provisions are preempted, petitioners do not identify which provisions fall within the category of preempted legislation, and petitioners do not identify any precise *non*-safety interest of the State that would be advanced by any particular provision of the licensing scheme. Accordingly, petitioners fail to provide any basis for overturning the lower courts' finding that Utah's scheme is entirely "grounded in [radiological] safety concerns." Pet. App. 52a (quoting *Pacific Gas*, 461 U.S. at 213). Petitioners' argument, moreover, overlooks the fact that Utah's comprehensive licensing scheme *as a whole* was targeted at the preempted field of nuclear safety and attempts to regulate within the NRC's "exclusive jurisdiction to license the * * * delivery, receipt, acquisition, possession and use of nuclear materials." *Pacific Gas*, 461 U.S. at 206. Thus, unlike the state moratorium upheld in *Pacific Gas*, in which the State was exercising its traditional authority over utilities to advance the economic interests of ratepayers, *id.* at 207-212, Utah's statutes exclusively target

a proposed nuclear waste storage facility, *i.e.*, a facility that generates no power within the State and solely engages in the "delivery, receipt, acquisition, [and] possession * * * of nuclear materials," *id.* at 207. Because Utah's laws erect targeted discriminatory barriers aimed at blocking respondents from engaging in those activities, Utah's statutory scheme "would * * * directly conflict with the NRC's exclusive authority" to license those activities. *Id.* at 212.

The court of appeals correctly concluded that, because Utah's scheme pervasively regulated the field of nuclear safety, the challenged provisions would have "'some direct and substantial effect on the decisions' * * * regarding radiological safety levels of SNF in Utah." *Pacific Gas*, 461 U.S. at 212 (quoting *English*, 496 U.S. at 85). Indeed, even the State's "informational" requirements directly regulate in the area of protection against radiological hazards. Those provisions would require PFS to undertake extensive studies in areas unquestionably within the NRC's authority to regulate, such as the environmental and human health risk and effects of radiation hazards. *E.g.*, Utah Code Ann. § 19-3-305(1), (4), (10), (12), (14); see also *id.* § 17-27-301(3)(a)(i) (incorporating informational provisions into county planning requirements).[6]

Petitioners also argue that, under *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238 (1984), States may require power plants to ensure adequate funding in the event of a nuclear accident, and that the unfunded liability provisions here were improperly inval-

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[6] Although some of the other informational provisions in Section 19-3-305 may have a non-safety rationale or serve non-safety interests, the State, as discussed, did not pass those provisions in isolation but as part of a comprehensive scheme that was targeted at preventing the facility from operating based primarily on safety concerns. We do not read the court of appeals' decision as preventing Utah from reenacting narrowly tailored statutes that do not seek to address radiological hazards and do not otherwise undermine the NRC's efforts to regulate nuclear facilities.

idated because the State has yet to determine what respondents' potential exposure would be or how respondents would make the required payment of 75% of its potential liability to the State. Pet. 25. *Silkwood* held that common law damages actions based on radiation accidents were not preempted because Congress specifically contemplated the availability of "existing state tort law remedies" in passing the Price-Anderson Act, 42 U.S.C. 2210, and because Congress had not provided any federal remedy for persons injured by a radiation accident. *Silkwood*, 464 U.S. at 251-252. Absent those considerations, the Court suggested, the result would likely have been different. *Id.* at 250-251.

This case involves not generally-applicable, pre-existing common law remedies expressly preserved by federal law, but an extraordinary regulatory bonding requirement that addresses an issue—the financial ability of a storage facility to compensate in the event of damages actions—expressly addressed by the federal scheme. As the court of appeals explained, "[u]nder the federal licensing scheme * * * it is not the states but rather the NRC that is vested with the authority to decide under what conditions to license an SNF storage facility." Pet. App. 45a. Indeed, the NRC in this case has already determined that PFS's $200 million nuclear energy liability policy, which was "the largest one currently available," is sufficient under NRC financial protection requirements. *Id.* at 43a. In addition, the NRC "at this juncture . . . has decided *not* to invoke its discretionary authority" to apply the Price-Anderson Act to SNF storage facilities. *Ibid.*; see 42 U.S.C. 2210(a). The State was not free to impose additional requirements based on its view of the safety risks associated with operation of the facility.

Utah's abolition of traditional limited liability for corporate shareholders suffers similar flaws. Pet. 24-26. The court of appeals explained that state law "removes [the] well established protection" of limited liability and "does so for reasons that the Utah officials concede are related to radiological safety con-

cerns." Pet. App. 47a. Unlike the "existing state tort law remedies" at issue in *Silkwood* (464 U.S. at 252) and in *English*, which applied in a *neutral* manner to all private employers, the State in this case has created a discriminatory rule of liability targeted solely at the nuclear waste industry based on its perceived threat of radiological hazards. Utah Code Ann. § 19-3-318(2)(b) ("An organization engaging in [nuclear waste] activities has significant potential to affect the health, welfare, or best interests of the state and should not have limited liability for its equity interest holders."). Thus, "the abolition of limited liability attempts a sea change in the law of corporations and is targeted at the nuclear industry only. The statutes do not involve a state tort remedy that existed prior to the enactment of federal legislation regarding nuclear power and that Congress intended to preserve." Pet. App. 47a.

The court of appeals also properly invalidated Utah's attempt to ban counties from providing PFS any municipal services, including "fire protection, garbage disposal, water, electricity, and law enforcement." Pet. App. 36a. Those sweeping provisions are designed to "address matters of radiological safety that are addressed by federal law and that are the exclusive province of the federal government." *Id.* at 37a. Although petitioners correctly observe that the AEA does not require counties to provide municipal services to nuclear waste facilities, Pet. 24-25, the State's "pervasive ban on providing municipal services here * * * targets only those engaged in SNF transportation and storage and does so for safety reasons." Pet. App. 38a . The court thus properly concluded that both the "purpose and effect of the state law" was to "use [the State's] authority to regulate law enforcement and other similar matters as a means of regulating radiological hazards." *Id.* at 40a-41a. The same is true of the county siting provisions, which force counties to adopt "specific measures * * * to guarantee the health and safety of the citizens of the

state" against the threats posed by nuclear waste. Utah Code Ann. § 17-27-301(3)(a)(iii).[7]

Petitioners also argue that the State's transportation provisions merely reallocate control over transportation to the facility away from the county and to the Governor and state Legislature. Petitioners accordingly argue that the State should be permitted to apply the provisions before determining that they conflict with federal law. Pet. 26. That contention lacks merit. Petitioners do not dispute that the purpose of the transportation provisions is "to prevent the transportation and storage of SNF in Utah" based on the State's concerns regarding nuclear safety. Pet. App. 49a (citing district court opinion, *id.* at 74a n.10). The evidence included the statement of the state legislator who sponsored the road provisions, explaining that they established a "moat" around the proposed SNF site. *Id.* at 49a. Moreover, the legislative history of the road and railroad crossing provisions confirms that they were based on health and safety concerns. *Id.* at 49a-50a, 74a n.10. The court of appeals also concluded that "by jeopardizing access to the proposed SNF storage facility, the Road Provisions directly and substantially affect decisions regarding radiological safety levels by those operating nuclear facilities," *id.* at 50a, and were preempted for that reason as well. See *id.* at 74a ("This metaphorical 'moat' more likely than not would prevent the construction of PFS's proposed SNF facility. * * * Governor Leavitt has made clear that he will not allow SNF into Utah if possible.").

3. Petitioners also argue that the court of appeals' decision conflicts with *Kerr-McGee Chemical Corp.* v. *City of West Chi-*

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[7] Petitioners' attempt to defend the ban on municipal services also does not warrant this Court's review because petitioners represent that those provisions will be rendered inapplicable if the NRC approves a license for PFS. Pet. 6. Thus, petitioners have no interest in having the Court grant plenary review of the Tenth Circuit's invalidation of that provision because it will, by petitioners' own admission, never be implemented by the State.

cago, 914 F.2d 820 (7th Cir. 1990), which held a state law not preempted when it was not clear that the state law would frustrate NRC's licensing regime. That decision, however, concerned a local erosion control and sedimentation ordinance that, quite unlike the state laws here, was completely "radiation neutral." *Id.* at 827. Here, by contrast, Utah's legislation targets a specific proposed nuclear waste facility with a comprehensive set of restrictive requirements that are aimed at preventing its construction and operation based upon nuclear safety concerns. Utah's legislation is simply not "radiation neutral." *Ibid.*

Petitioners also claim that the court of appeals' decision conflicts with *Citizens for an Orderly Energy Policy, Inc.* v. *County of Suffolk*, 813 F.2d 570 (2d Cir. 1987), which involved a county resolution declining to participate in radiological emergency response planning. The Second Circuit's decision, however, did not even independently discuss the issue of preemption, but merely affirmed the district court's resolution of the issue for "substantially for the reasons set forth in the district court's opinion." *Id.* at 571. In any event, the decision is readily distinguishable. The district court explained that Congress in passing the AEA "was well aware of the possibility that local governments might refuse" to engage in emergency planning. *Citizens for an Orderly Energy Policy, Inc.* v. *County of Suffolk*, 604 F. Supp. 1084, 1095 (E.D.N.Y. 1985). Here, no such Congressional intent supports the sweeping series of statutes passed by the State to regulate in the area of nuclear safety.

Petitioners' claim that the decision below conflicts with the NRC's views in *Long Island Lighting Co.*, 21 N.R.C. 644 (1985), fails for similar reasons. In that decision, the NRC's Atomic Safety and Licensing Board found that state laws prohibiting *the plant itself* from exercising traditional police powers in the event of a nuclear emergency (*e.g.*, by guiding off-site traffic or by directing the public) were not preempted. The NRC found that the state laws, which were neutral and not directed at the nuclear

industry, "were enacted * * * for purposes totally unrelated to nuclear safety concerns." *Id.* at 904; *ibid.* ("The apparent purposes * * * have no nexus with regulation of radiological health and safety. They are simply laws regulating local matters such as flow of traffic on public roads."). By contrast, Utah's comprehensive and targeted legislation is directly related to the State's concern about radiological safety levels at the proposed SNF storage facility and would have a direct and substantial effect on the federal health and safety regulatory scheme that protects against radiological hazards. The court of appeals thus correctly concluded that Utah's unique statutory scheme, viewed as a whole, is preempted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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